Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

JAMES TANCA,
*Petitioner*,

v.

NILS NORDBERG, COMMISSIONER,
and the MASSACHUSETTS
DEPARTMENT OF EMPLOYMENT
AND TRAINING,
*Respondents*.

**Petition For Writ of Certiorari**
**To The United States Court of Appeals**
**For The First Circuit**

# PETITION FOR WRIT OF CERTIORARI

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43 pp

## QUESTIONS PRESENTED

This petitions presents the following questions:

1. Do the amendments made by the Civil Rights Act of 1991, Public Law 102-166, pertaining to the allocation and order of the burden of proof in "mixed motive" employment discrimination cases apply to Title VII retaliation cases?

2. Do the amendments made by the Civil Rights Act of 1991 pertaining to the allocation and order of the burden of proof in "mixed motive" employment discrimination cases apply only to Title VII discrimination cases?

3. Does the holding of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), with regard to the allocation and order of the burden of proof in "mixed motive" employment discrimination cases apply to Title VII retaliation cases despite the more recent passage of the Civil Rights Act of 1991, which overruled Price Waterhouse v. Hopkins ?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE 1ST CIRCUIT

James Tanca ("Tanca") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on October 28, 1996, to decide an important question of federal law that has not been settled by this Court and to resolve the conflict between the First Circuit and other Federal Courts on this important issue.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit that gives rise to this petition is found at 98 F.3d 680 (1st Cir. 1996). It is reprinted in the Appendix hereto at page App. 1.

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## JURISDICTION

James Tanca brought this action in the District Court for Massachusetts, alleging retaliation in employment under section 704 of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-3, arising out of his employment by the Massachusetts Department of Employment and Training ("DET"). The case was tried to a jury, which on January 10, 1995, returned a verdict in Tanca's favor on the issue of liability. On February 1, 1995, DET moved that judgment be entered as a matter of law in its favor. The District Court granted that motion and entered judgment for DET on March 30, 1995. On April 11, 1995, Tanca timely moved for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure and moved for a new trial under Rules 50(c)(2) and Rule

59(a). On May 10, 1995, the District Court denied both motions.

Tanca timely appealed to the First Circuit, which affirmed in an opinion dated October 28, 1996.

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the First Circuit's decision. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

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## STATUTES INVOLVED IN THIS CASE

Section 107(a) of the Civil Rights Act of 1991, Public Law 102-166, amended Title VII of the 1964 Civil Rights Act at 42 U.S.C. §2000e-2 by adding subsection 2(m), which reads as follows:

> "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

Section 107(b) of the Civil Rights Act of 1991 amended 42 U.S.C. §2000e-5 [the remedial portions of Title VII] by adding subsection 5(g)(2)(B), which reads as follows:

> "(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --
>
> > (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be

> directly attributable only to the pursuit of a claim under section 703(m); and
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."

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## STATEMENT OF THE CASE

This was an action for retaliation in employment brought under Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e et seq.). James Tanca worked for the Department of Employment and Training for approximately 23 years, having worked since 1988 in its Hyannis, Massachusetts, office. In May, 1992, Tanca applied for the position of unemployment Insurance Manager in the Hyannis office. Tanca had previously held this position in Hyannis for a year and a half on a provisional basis and had been evaluated as performing well in that position. Nevertheless DET awarded this position to a person from another office who had no prior experience in this position.

Tanca alleged that the reason why DET denied him a promotion within his own office was that he had previously complained about reverse racial discrimination in DET's promotion practices.

The case was tried before a jury from January 3 through January 10, 1995. Near the end of the trial the District Court advised the parties that it was going to treat this Title VII retaliation case as a "mixed motive" case governed by the legal standards developed in the amendments to Title VII made by the Civil Rights Act of 1991, Public Law 102-166. The Court therefore ruled that Tanca would be able to establish a violation of Title VII by merely

showing that a retaliatory motive was a motivating factor in DET's employment decision even if DET eventually proved that it would have made the same employment decision despite the presence of the retaliatory motive.

[Prior to the passage of the Civil Rights Act of 1991, this Court had held in Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989), that an employer could avoid liability under Title VII if it proved that it still would have reached the same employment decision if it had not taken the discriminatory motive into account.]

On January 10, 1995, the jury returned a verdict in which it found for Tanca on the issue of liability. The jury found that a retaliatory motive had indeed been a motivating factor in DET's employment decision; however it also found that DET would have made the same employment decision despite the presence of the retaliatory motive.

On February 1, 1995, DET moved that judgment be entered in its favor as a matter of law, arguing inter alia that when Congress amended Title VII via the Civil Rights Act of 1991, it intended that its newly enacted "mixed motive" analysis apply only to 42 U.S.C. §2000e-2 (i.e., race, color, religion, sex and national origin claims) and that Congress did not intend to have its new "mixed motive" analysis apply to 42 U.S.C. §2000e-3 (i.e., retaliation claims) or to any other employment discrimination statute. DET argued that Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), was instead applicable to retaliation cases.

In a Memorandum and Order dated March 15, 1995, the District Court reversed itself and held that the amendments to Title VII made by the Civil Rights Act of 1991 as they pertain to "mixed motive" cases did not apply to retaliation cases brought under 42 U.S.C. §2000e-3. It held that retaliation cases instead were still governed by the prior authority of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Court then granted DET's motion for judgment as a matter of law and entered judgment for DET on March 30, 1995.

The First Circuit has now affirmed this decision, holding that

the mixed motive provisions of section 107 of the 1991 Civil Rights Act do not apply to Title VII retaliation claims because the "plain language" of section 107 only mentions race, color, religion, sex and national origin and further holding that Price Waterhouse instead applies to Title VII retaliation claims.

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## REASONS FOR GRANTING THE WRIT

### I. The First Circuit's Opinion Directly Conflicts With Virtually All Other Federal Decisions On The Issue.

The First Circuit's opinion is in direct conflict with virtually all other Courts that have ruled on scope of the application of the Civil Rights Act of 1991. Innumerable Federal Courts have applied the new "mixed motive" analysis enacted by section 107 of the Civil Rights Act of 1991 and found in 42 U.S.C. §2000e-2(m) to a variety of other employment discrimination statutes and claims, including retaliation claims, despite the fact that the "plain language" of §2000e-2(m) only refers to race, color, religion, sex and national origin claims. Section 2000e-2(m) has been held to apply to:

1. handicap discrimination cases brought under the Americans with Disabilities Act (42 U.S.C. §12112). Pedigo v. P.A.M. Transport, Inc., 60 F.3d 1300 (8th Cir. 1995);

2. retaliation cases brought under the Americans with Disabilities Act (42 U.S.C. §12203). Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1316 (E.D. Pa. 1994);

3. retaliation cases brought under 42 U.S.C. §1981.

Lewis v. American Foreign Service Ass'n, 846 F. Supp. 77, 82 (D.D.C. 1994); and

4. retaliation cases brought under Title VII (42 U.S.C. §2000e-3). Beinlich v. Curry Development, Inc., 54 F.3d 772 (table), 1995 U.S. App. LEXIS 12109 (4th Cir. 5/22/95) (unpublished disposition); Jones-Bell v. Illinois Department of Employment Security, 1995 U.S. Dist. LEXIS 17344, 17 & 25 (E.D. Ill. 11/16/95); Woodson v. Scott Paper Co., 898 F. Supp. 298 (E.D. Pa. 1995); Hall v. City of Brawley, 887 F. Supp. 1333 (S.D. Cal. 1995); Selgas v. American Airlines, Inc., 858 F. Supp. 316, 319, n. 2 (D. P.R. 1994), aff'd 69 F.3d 1205 (1st Cir. 1995).

The First Circuit's opinion in the instant case, holding that the "plain language" of section 2000e-2(m) limits the application of the new "mixed motive" analysis to claims of race, color, religion, sex, or national origin discrimination under Title VII, directly conflicts with all of the above authorities.

The only other decision holding as the First Circuit has now ruled is Reiss v. Dalton, 845 F. Supp. 742 (S.D. Cal. 1993). However, that decision itself is in direct conflict with a later decision from the same District. See Hall v. City of Brawley, supra.

Because of these conflicts certiorari is appropriate.

## II. The First Circuit's Opinion Is Contrary To The Policies Embodied In The Civil Rights Act of 1991.

When Congress passed the Civil Rights Act of 1991 it intended to overrule Price Waterhouse "by setting forth standards applicable in `mixed motive' cases." Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 1489-1490 (1994). In Section 3(4) of the Act Congress stated that one of the purposes of the Act was

"to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." (emphasis added) Nowhere within the Act did Congress provide even a hint that it approved of the Price Waterhouse "mixed motive" holding. Yet, the First Circuit's decision now actually limits the scope of the Civil Rights Act of 1991 and other civil rights statutes.

Furthermore, the First Circuit's decision actually expands Price Waterhouse's holding. Price Waterhouse was a Title VII sex discrimination case brought under 42 U.S.C. §2000e-2. Price Waterhouse was not retaliation case and in fact never even mentioned retaliation in the body of its decision. Therefore the First Circuit decision, by expanding the scope of Price Waterhouse and limiting the scope of the Civil Rights Act of 1991, is contrary to the policy of the Act.

Certiorari is appropriate.

## III. The First Circuit's Opinion Deviates From Accepted Judicial Practice In Employment Discrimination Cases.

For years Federal Courts, including the First Circuit, have routinely borrowed concepts developed under 42 U.S.C. §2000e-2 and applyed them to other employment discrimination statutes. The following is a listing of some of such concepts borrowed from 42 U.S.C. §2000e-2 and applied to other discrimination statutes:

1. courts have applied the burden of proof analysis developed under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to age discrimination cases brought under the ADEA (29 U.S.C. §623(a)). See Roper v. Peabody Coal Co., 47 F.3d 925, 926-927 (7th Cir. 1995); Rinehart v. City of Independence, 35 F.3d 1263, 1265 (8th Cir. 1994), cert. denied, 514 U.S. ___ (1995); Seman v. Coplay

Cement Co., 26 F.3d 428, 432, n. 7 (3rd Cir. 1994); Roush v. KFC Nat. Mgt. Co., 10 F.3d 392, 396 (6th Cir. 1993), cert. denied, 513 U.S. ___ (1994); Lindsey v. Prive Corp., 987 F.2d 324, 326, n. 5 (5th Cir. 1993); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1442 (11th Cir. 1985), cert. denied, 474 U.S. 1005, 88 L. Ed. 2d 457, 106 S. Ct. 525 (1985); Haskell v. Kaman Corp., 743 F.2d 113, 119 (2nd Cir. 1984); Cuddy v. Carmen, 224 U.S. App. D.C. 287, 694 F.2d 853, 856-857 (D.C. Cir. 1982); Douglas v. Anderson, 656 F.2d 528, 531-532 (9th Cir. 1981); Loeb v. Textron, Inc., 600 F.2d 1003, 1014-1016 (1st Cir. 1979); Schwager v. Sun Oil Co. of Pa., 591 F.2d 58, 60-61 (10th Cir. 1979).

2. courts have applied McDonnell Douglas Corp. v. Green to civil rights cases brought under 42 U.S.C. §1981 and 42 U.S.C. §1983. See Ramsey v. American Air Filter Co.,772 F.2d 1303, 107 (7th Cir. 1985);

3. courts have analyzed pension discrimination claims brought under §510 of ERISA (29 U.S.C. §1140) using the analysis developed under McDonnell Douglas Corp. v. Green. See Conkwright v. Westinghouse Electric Corp., 933 F.2d 231, 239 (4th Cir. 1991); Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988);

4. courts have applied McDonnell Douglas Corp. v. Green to retaliation cases brought under the ADEA (29 U.S.C. §623(d)). See Mesnick v. General Electric Co., 950 F.2d 816, 827 (1st Cir. 1991), cert. denied 504 U.S. 985, 112 S. Ct. 2965 (1992); and

5. courts have borrowed and adopted formulae developed under McDonnell Douglas Corp. v. Green, Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), and their progeny to retaliation cases brought Title VII (42 U.S.C. §2000e-3). See Hazel v. U.S. Postmaster, 7 F.3d 1, 3 (1st Cir. 1993).

In fact even though Price Waterhouse was by its terms only a 42 U.S.C. §2000e-2 case, numerous Courts prior to the passage of the Civil Rights Act of 1991 routinely applied this form of analysis of "mixed motive" cases to virtually every other employment discrimination statute. Courts prior to the Civil Rights Act of 1991 applied this Price Waterhouse "mixed motive" analysis to:

1. age discrimination cases brought under the ADEA (29 U.S.C. §623(a)). See Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3rd Cir. 1995); Cram v. Lamson & Sessions Co., 49 F.2d 466 (8th Cir. 1995); Radabaugh v. Zip Feed Mills, 997 F.2d 444 (8th Cir. 1993); Ostrowskit v. Atlantic Mut. Ins. Cos., 968 F.2d 171 (2nd Cir. 1992); Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104 (9th Cir. 1991); Visser v. Packer Eng. Assocs., 909 F.2d 959 (7th Cir. 1990);

2. civil rights cases brought under 42 U.S.C. §1981. See Carter v. South Cent. Bell, 912 F.2d 832 (5th Cir. 1990);

3. handicap discrimination cases brought under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794). See Cortes v. Board of Governors of State Colleges & Univs. for Northeastern Illinois, 1990

U.S. Dist. LEXIS 15414 (N.D. Ill. 1990);

4. retaliation cases brought under the ADEA (29 U.S.C. §623(d)). See Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3rd Cir. 1993); and

5. retaliation cases brought under Title VII (42 U.S.C. §2000e-3). See Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470-1471 (10th Cir. 1992).

Thus innumerable Courts have observed the judicial practice of borrowing a concept developed under 42 U.S.C. §2000e-2 and applying it to other employment discrimination statutes, including 42 U.S.C. §2000e-3. The judicial purpose for this continuing practice was summarized by the Third Circuit in the case of Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3rd Cir. 1995), where it stated:

> "In the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose -- to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well."

However, the First Circuit by holding in the instant case that the new "mixed motive" analysis put forward by the Civil Rights Act of 1991 is limited to cases of race, color, religion, sex, or national origin discrimination and that Price Waterhouse is instead applicable to retaliation cases, has deviated from this long accepted practice.

Furthermore this deviation is not just a minor one; it affects the entire outcome of the case. If the First Circuit's opinion were correct, then, for example, a plaintiff who shows that race was a

motivating factor, but not the motivating factor, in a discharge would be a prevailing party while a plaintiff who shows that retaliation was a motivating factor, but not the motivating factor, would be a losing party.

Certiorari is therefore warranted.

## IV. The First Circuit's Opinion Directly Conflicts With The Legislative History Of The Civil Rights Act of 1991.

The legislative history of the Civil Rights Act of 1991 quite clearly states that Congress did in fact intend that the "mixed motive" analysis incorporated into 42 U.S.C. §2000e-2 be applied to all other employment discrimination statutes. House Report No. 102-40(II) by the Judiciary Committee, dated May 17, 1991, devotes an entire section to the topic: "RELATIONSHIP TO OTHER LAWS MODELED AFTER TITLE VII." In this section the Judiciary Committee expressly states that any "mixed motives" analysis made under other laws banning employment discrimination should be done in a manner consistent with the amendments made by the Civil Rights Act of 1991.

> "A number of other laws banning discrimination, including the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101 et seq. and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621, et seq., are modeled after, and have been interpreted in a manner consistent with, Title VII.
>
> The Committee intends that these other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII. Thus, under the ADA,

> once a plaintiff makes a prima facie case of disparate impact, the burden then shifts to the defendant to demonstrate business necessity, using the same standards as under Title VII. This was the clear intent of the Committee during its consideration of the ADA.
>
> Similarly, mixed motive cases involving disability under the ADA should be interpreted consistent with the prohibition against all intentional discrimination in Section 5 of this Act." (Id. at 4) [emphasis added]

From the foregoing legislative history, it is clear that Congress intended that no part of the prior Price Waterhouse "mixed motive" analysis should remain in effect. This conclusion is supported by many other references in the legislative history. This same Report further states that: "the Committee intends to restore the rule applied by the majority of circuits prior to the Price Waterhouse decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability." (Id. at 18) [emphasis added]

Again certiorari is warranted.

## V. The First Circuit's Opinion Ignores Other Relevant Legislative History.

In its decision the First Circuit justifies not following the foregoing legislative history by stating that in the instant case it was not being asked to borrow a Title VII concept and use it to interpret another statute; rather it was being asked to read one Title VII provision into another. (App. 9)

However, this argument raises form over substance, creates inconsistent results within Title VII and ignores other relevant legislative history. House Report No. 102-40(I) by the Education

and Labor Committee, dated April 24, 1991, repeatedly indicates that its new "mixed motive" analysis should be applied to "Title VII" without any distinction as to whether it is a case brought under §2000e-2 of Title VII or a case brought under §2000e-3 of Title VII. On page 46 of the Report the Committee speaks approvingly of the Department of Justice's original argument to the U.S. Supreme Court in Price Waterhouse v. Hopkins that: "Title VII was violated whenever a discriminatory motive played a part in an employment decision." (emphasis added) The Report goes on to quote from the Justice Department brief as follows:

> "Title VII ... should be construed to allow the defendant in a disparate treatment case to prove that, because the adverse employment decision would have been made in any event for legitimate, nondiscriminatory reasons, the plaintiff will be made whole by an award of attorney's fees and an injunction against future discrimination. Brief for the United States as Amicus Curiae at 23-24, Price Waterhouse v. Hopkins, 109 S.Ct 1775 (1989) (No..87-1167) (citations omitted.)" (Id., at 46, ftnt 40.) [emphasis added]

The Committee further describes how the holding of Price Waterhouse jeopardizes Title VII's ban on discrimination.

> "If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. Price Waterhouse jeopardizes that fundamental principle." (Id. at 47) [emphasis added}

At the very end of this same House Report, the Committee again repeats and summarizes its position that "Title VII" is violated

whenever there is a contributing discriminatory factor.

> "However, the presence of a contributing discriminatory factor would still establish a Title VII violation, and a court could order other appropriate relief, including injunctive or declaratory relief, compensatory and punitive damages where appropriate, and attorney's fees." (Id. at 49.) [emphasis added]

Lastly, on November 7, 1991, Rep. Edwards of California offered on the floor of the House of Representatives an interpretive memorandum with a section-by-section analysis of the Civil Rights Act of 1991 in which it was stated that: "Section 107 reversed [the Price Waterhouse] holding and provides that it is unlawful for an employer to rely on race, sex or any other prohibited factor in making an employment decision." 137 Cong. Rec . H 9529 (Nov. 7, 1991).

Thus the legislative history to the Civil Rights Act of 1991 is replete with evidence that Congress intended that its new "mixed motive" interpretation and analysis should be applied to all classes of employment discrimination plaintiffs, both within Title VII and outside of Title VII.

## VI. The First Circuit's Opinion Deviates From The Supreme Court's Interpretation Of The Plain Meaning Rule.

In reaching its result the First Circuit relies exclusively upon its understanding of the so-called plain meaning rule to conclude that Congress must have intended to apply its new "mixed motive" analysis only to 42 U.S.C. §2000e-2 because it only amended that section of the statute. In doing so, however, the First Circuit ignore the Supreme Court's holdings that the plain meaning rule is one rule

of interpretation, among many, and is not a rule of law.

The plain meaning doctrine is not a pedagogical absolute. This rule of construction is more an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence' in contradiction to supposedly plain meaning if such evidence exits. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928). Hence, a court must always hesitate to construe words in a statute according to their apparent meaning if to do so would defeat Congress's discovered intendment. See Bob Jones Univ. v. United States, 461 U.S. 574, 586, 103 S. Ct. 2017, 76 L. Ed. 2d 157 (1983); Watt v. Alaska, 461 U.S. 259, 266, 68 L. Ed. 80, 101 S. Ct. 1673 (1981); Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892). Deference to the plain meaning rule should not be unthinking or blind. A Court should go beyond the plain meaning of the statutory language when adherence to it would produce an absurd result or an unreasonable one plainly at variance with the policy of the legislation as a whole. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982); In re Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978).

Thus, in the instant case, it is inappropriate to cite the plain meaning rule to avoid the clear legislative history which declares that Congress intended that all other employment discrimination statutes modeled after Title VII adopt its new "mixed motives" analysis.

Furthermore, in this context, where Congress clearly has stated that it wishes to overrule Price Waterhouse, the "plain meaning" rule must also be evaluated along side of other rules of construction. It also is a rule of statutory construction that when Congress passed the Civil Rights Act of 1991, it is presumed to have known of the long established judicial practice of borrowing the order and allocations of burdens of proof developed under section 2000e-2 of Title VII and applying them to retaliation cases brought under 2000e-3 and other employment discrimination statutes. This presumption is also an ancient rule of statutory

construction. See Am. Jur., Statutes, §339, pp. 331-332; Exploration Company v. U.S., 247 U.S. 435, 449 (1918); Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 274-75 (8th Cir. 1962), cert. denied, 371 U.S. 912 (1962).

Lastly, the plain meaning rule should not used as device to bury one's head in the sand. Price Waterhouse was a section 2000e-2 case. When Congress wished to overturn Price Waterhouse, it most logically amended section 2000e-2. That is the most obvious reason why it did not amend section 2000e-3, the ADEA, the ADA or any other employment discrimination statute. And there is no evidence that Congress no longer approves of the judicial practice of borrowing and applying concepts developed under 42 U.S.C. §2000e-2 to other types of employment discrimination cases, including retaliation cases.

Therefore Congress' failure to amend all other employment discrimination statutes at the same time that it amended 42 U.S.C. §2000e-2 hardly plainly means that it intended different results under different statutes.

## VII. The First Circuit's Opinion Is Self-Contradictory.

In its decision the First Circuit concludes, without any rationale, that if the Civil Rights Act of 1991 does not apply to 42 U.S.C. §2000e-3, then Price Waterhouse must. This is not, however, a necessary conclusion, and it is a conclusion that cannot be reached without self contradictions.

As stated, Price Waterhouse was a section 2000e-2 discrimination case. No court can therefore believe that Price Waterhouse is or ever was applicable to section 2000e-3 retaliation cases unless it adopts the principle that concepts developed under section 2000e-2 must be also be applied to section 2000e-3. Yet, if a court does adopt that principle, then that court must also conclude that the current mixed-motive analysis developed by Congress for section 2000e-2 must now also apply to section

2000e-3. Either a Court believes in the principle of borrowing concepts developed under section 2000e-2 or it does not. If it does not believe in the principle, then Price Waterhouse cannot apply to Title VII retaliation cases. If it does believe in the principle, then the Civil Rights Act of 1991 applies to Title VII retaliation cases. In either event, the First Circuit's conclusion is erroneous.

For this reason also certiorari is warranted.

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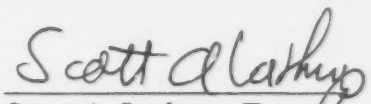
## CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

James Tanca
By his attorney



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Dated: 1/16/97

**APPENDIX**
**United States Court of Appeals**
**For the First Circuit**

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No. 95-1628

JAMES TANCA,
Plaintiff - Appellant,
v.
NILS NORDBERG, COMMISSIONER,
AND THE MASSACHUSETTS DEPARTMENT
OF EMPLOYMENT AND TRAINING,
Defendants - Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nancy J. Gertner, U.S. District Judge]

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Before
Torruella, Chief Judge,
Stahl and Lynch, Circuit Judges.

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Scott A. Lathrop, with whom Scott A. Lathrop, P.C. was on brief for appellant.

Benjamin Robbins, Assistant Attorney General, with whom Scott Harshbarger, Attorney General of Massachusetts, and Douglas Wilkins, Assistant Attorney General, were on brief for appellees.

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October 28, 1996

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**TORRUELLA, Chief Judge.** Appellant James Tanca ("Tanca") brought this action alleging retaliation under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 20O0e-3, against his employer, the Massachusetts Department of Employment and Training ("DET") and Nils Nordberg, Commissioner of the DET.[1] The central issue is whether the changes wrought in the law by section 107 of the Civil Rights Act of 1991, public Law 102-166 (the '1991 Act"), which explicitly apply only to discrimination claims (and which were meant to partially overrule Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)) , also apply to claims of retaliation. We hold that they do not and that the rule of Price Waterhouse applies to retaliation claims.

## BACKGROUND

The following facts are drawn from the district court's Memorandum and Order. Tanca is a white male who was a long term DET employee. After several minority employees were promoted into positions for which Tanca had applied, Tanca complained to high level DET managers. He believed that he was better qualified than the promoted employees and that their promotion was due to reverse discrimination. At some point, a position as an unemployment Insurance Manager ("UI") became available in DET's Hyannis, Massachusetts, office, where Tanca worked, and he applied. Instead of offering him the Hyannis UI position, however, DET offered him a similar position in New Bedford, Massachusetts. Tanca brought suit, alleging that DET retaliated against him for making his complaints -- a protected activity -- by refusing him the Hyannis position and offering him the New Bedford one. Because of the distance between Hyannis, where he lived, and New Bedford Tanca described the offered position as significantly less desirable. DET denied that the decision

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1 A count alleging violations of Mass. Gen. L. ch. 151B was voluntarily dismissed.

was motivated by retaliation, and maintained that it was based solely on legitimate concerns regarding Tanca's management abilities and DET's ability to supervise Tanca in New Bedford.

The case was tried before a jury, which found that Tanca had engaged in good faith activity protected under Title VII, that the activity was a motivating factor in DET's decision (and thus that DET had retaliated), but that Tanca would not have received the Hyannis UI position even absent the illegitimate consideration. The district court then granted defendants' Motion for Judgment as a Matter of Law, finding that Price Waterhouse governed the parties' dispute and that, under that case, because the jury found that DET would have reached the same decision absent any retaliatory motives, DET could not be found liable. This appeal ensued.

## DISCUSSION

### A. Price Waterhouse and the 1991 Act

We first outline the pertinent law, and then turn to the interpretation of the statutes in question.

#### 1. The Legal Framework

At the center of this case sits the Supreme Court's decision in Price Waterhouse. In that gender bias decision, the Court confronted a case in which the adverse employment decision resulted from a mixture of legitimate and illegitimate motives. Settling a dispute among the circuits over how to deal with such "mixed motive" cases, see Price Waterhouse, 490 U.S. at 238 n.2, the Court determined that tan employer shall not be liable if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." Id. at 242. As the trial court in this case noted, "[p]ut another way, the Court held that it was an affirmative defense to a charge of unlawful intentional discrimination to show that the employer would have

made the same decision even in the absence of an unlawful motive." Memorandum and Order, at 3.

Although Price Waterhouse was a gender case under 42 U.S.C. §2000e-2, the Supreme Court stated that its analysis extended to the other unlawful employment practices listed in section 2000e-2 (a), namely, "discrimination based on race, religion or national origin." Id. at 244 n.9. Subsequent cases have extended the Price Waterhouse analysis to a series of other discrimination contexts, including retaliation claims. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1039-41 (2d Cir. 1993) (analyzing Title VII retaliation claim under Price Waterhouse); Griffiths v. CIGNA Corp., 988 F.2d 457, 468 (3d Cir.) (noting that Price Waterhouse applies to mixed motive retaliation claims), cert. denied, 510 U.S. 865 (1993), overruled on other grounds, Miller v. CIGNA Corp., 47 F.3d 586, 596 n.8 (3d Cir. 1995); Kenworthy v. Conoco, Inc., 979 F.2d 1462, 1470-71 (10th Cir. 1992) (applying Price Waterhouse to Title VII retaliation claim). Indeed, at least one court has analyzed retaliation claims in terms of Price Waterhouse even subsequent to the passage of the 1991 Act. See Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 893 (7th Cir. 996). However, neither the Supreme Court nor this Circuit has held that Price Waterhouse applies to retaliation cases.

However, Congress partially overruled Price Waterhouse in the 1991 Act by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases. See Landgraf v. USI Film Prods., 511 U.S. 244, __, 114 S. Ct. 1483, 1489 (1994). First, section 107(a) of that Act, codified at 42 U.S.C. § 2000e-2(m), determines that an employment practice is unlawful even if there are legitimate, as well as illegitimate, motivations for it. [2] Next, section 107(b) of

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2 Section 107(a) reads:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color,

the Act, codified at 42 U.S.C. § 2000e-5(g) (2) (B), establishes that if the plaintiff proves a violation of section 107 (a) , but the defendant demonstrates that it "would have taken the same action in the absence of the impermissible motivating factor, id. , the court may grant declaratory and injunctive relief as well as attorney's fees, although it cannot grant other damages, such as monetary relief or reinstatement.[3] Thus, where Price Waterhouse

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> religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

3 Section 107(b) states, in relevant part, that

> [0]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--
>
> > (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2 (m) of this title; and
> >
> > (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g) (2) (B)

would not have held there was no liability and so would not have allowed any damages, the 1991 Act enables an employee in at least some mixed motive cases to receive certain limited relief.

2. Statutory Interpretation

Tanca argues that the new mixed motive damages provision applies to all forms of employment discrimination cases, including his own retaliation claim, and we should allow him the liability finding and remedies under section 107(b) the statute permits. We are accordingly faced with an issue of statutory interpretation: do the mixed motive provisions of section 107(b) extend to Title VII retaliation claims brought under 42 U.S.C. § 2000e-3?

As always, we begin our analysis with the plain language of the statute. See, e.g., United States v. Ramirez-Ferrerr, 82 F.3d 1131, 1136 (1st Cir. 1996). By doing so, we immediately encounter Tanca's fundamental problem: as a retaliation claim, his suit was brought under section 2000e-3,[4] and although section 107(b) specifically addresses section 107(a), it makes no mention of section 2000e-3. Indeed, section 107(b) plainly states that it applies to "a claim in which an individual proves a violation under 2000e-2 (m) [107(a)]." Section 107 (a) , in turn, specifies that "an

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4 That section, which codifies sectlon 704 of the 1964 Civil Rights Act, makes it an unlawful employment practice for an employer to discriminate against an employee

> because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, participated testified, assisted, or in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3 (a).

unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor."[5] There is no reference to section 2000e-3 or retaliation claims in either provision. As the district court found, "nothing in the 1991 Act would appear to change any rule with respect to retaliation claims which existed prior to its enactment." Memorandum and Order, at 8; cf. Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 116 (1st Cir. 1994) ("[A] legislature's affirmative description of certain powers or exemptions implies denial of nondescribed powers or exemptions."). On its face, then, the statute seems to express an intent not to preclude application of Price Waterhouse in the context of mixed-motive retaliation cases. See Reiss v. Dalton, 845 F. Supp. 742, 944 (S.D. Cal. 1993) (rejecting application of section 107(b) to Title VII mixed motive retaliation claim as contrary to the plain meaning of the statute).

Tanca argues otherwise. He maintains that reliance on the plain meaning of the statute would be inappropriate, because the "clear" legislative history demonstrates that Congress intended that other employment statutes modeled after Title VII adopt its new mixed motive analysis.[6] See Greenwood Trust Co. v.

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5 The parties do not make an argument on the basis of the "[e]xcept as otherwise provided in this subchapter" language of section 107(a), quoted in footnote 2, supra. We note that we do not read the quoted language as expanding the scope of § 2000e-2 (m) to include retaliation claims. Indeed, such an argument "would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message." Landgraf, 511 U.S. at 262.

6 Tanca also seeks support from section 3(4) of the 1991 Act. That section states that one of the Act's purposes was 'to respond to recent decisions of the Supreme Court by expanding the scope

Massachusetts, 971 F.2d 818, 825 (1st Cir. 1992) ("[A] court must always hesitate to construe words in a statute according to their apparent meaning if to do so would defeat Congress's discovered intendment. "), cert. denied, 506 U.S. 1052 (1993).

First, he argues that, because we "must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it . . . amends a statute," Ramirez-Ferrer, 82 F.3d at 1137, we must presume that Congress knew of the judicial practice of borrowing the order and allocations of burdens of proof developed under Title VII and applying them to retaliation cases and other employment discrimination cases. See, e.g., Griffiths, 988 F.2d at 468. Therefore, the argument goes, Congress' failure to amend all other employment discrimination statutes at the same time that it amended section 2000e-2 can mean that Congress presumed that the courts would continue to borrow and apply Title VII concepts, including the newly minted mixed motive damages provision. Indeed, there is some arguable support in the legislative history for his position. The House Report from the Judiciary Committee states that

> [t]he Committee intends that . . . other laws modeled after Title VII be interpreted consistently in a manner consistent with Title VII as amended by this Act. For example, disparate impact claims under the ADA should be treated in the same manner as under Title VII.

HR. Rep. No. 40(11), 102d Cong., 1st Sess. 4 (1991), reprinted in

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of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." Although this language lends credence to the premise that Congress sought to overturn Price Waterhouse at least in part, it does not necessarily follow that Congress felt victims of discrimination could only be "adequate[ly] protect[ed]" if a new rule was established in relation to retaliation claims as well as the enumerated discrimination claims.

1991 U.S.C.C.A.N. 694, 697.

Assuming arguendo that Congress did intend the section 107 model to apply beyond Title VII, Tanca's argument still fails. Simply put, Tanca is not arguing that we borrow a Title VII concept and use it to interpret another statute, such as the ADA. Rather, he wants us to read one Title VII provision into another. He contends that Congress wanted us to do such borrowing, but it seems just as likely that because Congress knew of the judicial borrowing, in order to avoid such borrowing it specified which particular aspects of Title VII would be affected by referencing 107(a) in section 107(b). Tanca cites no legislative history that suggests otherwise.

This interpretation gains additional support from the fact that " ' [w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). Section 102 of the 1991 Act, codified at 42 U.S.C. § 1981a, provides for compensatory and punitive damages and specifies that its provisions will apply to complaining parties who bring an action under section 2000e-3 — the retaliation section at issue here -- as well as 2000e-2. 42 U.S.C. § 1981a(a) (1). Thus, because Congress addressed the retaliation section elsewhere in the 1991 Act, but chose not to do so in section 107 (a) or (b) , it would seem that "where Congress intended to address retaliation violations, it knew how to do so and did so expressly. "[7] Reiss, 845 F. Supp. at 745.

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7 Indeed, although section 107(b) does not reference retaliation claims, the already existing subsection immediately preceding it in Title VII does. See 42 U.S.C. § 2000-c(5) (g) (2) (A). As appellees note, the inclusion of retaliation claims in one subsection, juxtaposed with their omission in the next, tends to support the premise that Congress' omission of the claim in the

Second, Tanca cites a series of additional passages from the legislative history in arguing that Congress intended that no part of the prior Price Waterhouse mixed motive analysis should remain in effect. As Tanca argues, statements such as the following could be read to support the premise that the 1991 Act should be read liberally as regards mixed motive cases:

> If Title VII's ban on discrimination in employment is to be meaningful, victims of proven discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions. Price Waterhouse jeopardizes that fundamental principle.

H.R. Rep. 40(I) , 102d Cong., 1st Sess. 47 (1991) , reprinted in 1991 U.S.C.C.A.N. 549, 585 (Education and Labor Committee Report).

We need not enter into his argument in detail, however, as our review of this and the other passages of the legislative history on which Tanca seeks to rely leads us to the conclusion that Congress' intent remains unclear regarding the application of the 1991 Act to Title VII mixed motive retaliation claims. Indeed, such claims are never directly addressed in the cited legislative history. "'Absent a clearly expressed legislative intention to the contrary [the] language [of a statute] must ordinarily be regarded as conclusive.' " Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 825 (1990) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 105 (1980)). Therefore, as the plain meaning of the statute is clear, and this is not a statute whose "meanings . . . take on different colorations when read in their legislative and historical context," Greenwood Trust Co., 971 F.2d at 826, we conclude that the mixed motive provisions of section 107 of the 1991 Act do not apply to Title VII retaliation claims

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latter provision was intentional. See Reiss, 845 F. Supp. at 745.

brought under section 2000e-3.

We are conscious that our decision in this case goes against those of some federal courts that have looked at this issue. However, examination of the cases Tanca cites as support for his argument reveals that, although all of them would apply section 107(b) to Title VII mixed motive retaliation claims, and some of them examined the legislative history in drawing that conclusion, none of them weighed the plain language of the statute prior to borrowing the provision. See Beinlich v. Curry Dev. Inc., 54 F.3d 772 (table), No. 94-1465, 1995 WL 311577 (4th Cir. May 22, 1995) (unpublished disposition) (citing sections 107(b) and 2000e-3 (a), without applying them, in retaliation claim); Woodson, 893 F. Supp. at 304-06 (pretext case) ; Hall v. City of Brawley, 887 F. Supp. 1333, 1345 (S.D. Cal. 1995); Jones-Bell v. Illinois Dept. of Employment Sec., No. 95 C 948, 1995 WL 692321, at *6-*7 (N.D. Ill. Nov. 20, 1995) .[8] Indeed, the only case we found that examined

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8 The parties cite one case from this circuit. In Selgas v. American Airlines, Inc., 858 F. Supp. 316 (D.P.R. 1994), the district court was faced with a claim that the jury's answers to special interrogatories regarding Title VII retaliation and sex discrimination claims were contradictory. The employer, American Airlines, argued that the jury found that American would have made the same employment decisions even if Selgas' gender were not taken into account, and so American had an absolute defense under Price Waterhouse. The district court found that supplemental questions put to the jury remedied any inconsistencies in the verdict, but noted in passing that the 1991 Act had overruled Price Waterhouse. Id. at 318 n.2. The district court cited Robinson v. Southeastern Pa. Transp. Auth., 982 F.2d 892 (3d Cir. 1993), as support for that proposition. Examination of Robinson shows that the court there cited the 1991 Act only for the proposition that "Title VII contemplates that a corporation may be liable for dismissing an employee when its motives contain a mixture of legitimate and illegitimate reasons." Id. at 899 & n.8.

the statute under traditional statutory interpretation methods supports our conclusions here. See Reiss, 845 F. Supp. at 744-45. Nothing in the cited cases or others we have examined lead us to question our conclusion. We also believe that the Price Waterhouse rule does apply to mixed motive retaliation claims. Accordingly, we weigh the remainder of Tanca's arguments under Price Waterhouse.

## B. The Jury Instructions

Tanca's next argument centers on the jury instructions. Question four on the jury verdict form asked: "Would the employer have offered Mr. Tanca a promotion in Hyannis were it not for plaintiff's protected opposition?" The jury sent a note to the judge regarding question four as follows:

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As the underlying dispute in Robinson was tried prior to the 1991 Act's enactment, the court did not apply it to the dispute.

A panel of this court affirmed in part and vacated in part the district court's decision. See Kerr-Selgas v. American Airlines, Inc., 69 F.3d 1205 (1st Cir. 1995). The panel found that American had no alternative just cause to fire Selgas. Thus neither Price Waterhouse nor the 1991 Act was implicated. Id. at 1210-11. In outlining American's failed argument, the panel cited Griffiths v. CIGNA Corp. for the proposition that section 107(b)'s affirmative defense would apply to the retaliation claim. Id. at 1210; see Griffiths, 988 F.2d at 472. However, the court in Griffiths neither applied section 107(b) to the plaintiff's retaliation claim nor engaged in any statutory interpretation of its applicability, as that case was brought prior to the application of the 1991 Act. In the end, we find that, although there is some suggestion in Kerr-Selgas that the 1991 Act should apply to Tanca's claim, neither of the cases relied on for that proposition, nor Kerr-Selgas itself, supplies us with any reason to doubt the result reached here today.

> Does the word "a" refer to any promotion in the Hyannis office or the specific UI position for which Mr. Tanca had applied?

The court replied that

> [t]he words "a promotion" in Question 4 refers [sic] to the specific UI position for which Mr. Tanca had applied.

The jury then returned a verdict answering question four in the negative, finding that DET would not have offered Tanca the UI position in Hyannis, even without the illegitimate motivations.

Tanca argues now that the UI position was not the only Hyannis position that the jury should have considered. In fact, he points out, after naming the new Hyannis UI, DET created a new manager position below the UI in Hyannis, which would also have been a promotion for Tanca. This position was not offered to Tanca. Based on this, Tanca claims DET did not satisfy its burden of proof under Price Waterhouse in that it did not prove that it would have come to the same decision even if it had not taken the unlawful motive into account. See Price Waterhouse, 490 U.S. at 244. The pertinent decision here, he contends, was DET's choice to offer him a position in New Bedford, and not one in Hyannis. While the jury found that DET would not have offered him the Hyannis UI position, it did not find that DET would not have offered him the new manager position either, he maintains, because it was not asked. Therefore, he continues, the court should have responded to the jury's inquiry by telling them that question four referred to any promotion in the Hyannis office. Since it did not, he concludes, DET has not met its burden under Price Waterhouse. Tanca acknowledges that he did not object to the district court's response, but contends that it was not his duty to do so: as DET had to prove each element of its defense, he argues, it should have objected.

Our review of the record below, however, reveals no

mention of the new manager position in Tanca's Complaint, Opposition to Defendants' Motion for Summary Judgment, pre-trial Memorandum, Trial Brief, Motion for a New Trial, or Opposition to Defendants' Motion for Judgment. Nor did Tanca object to either the jury instructions or the judge's answer to the jury's question on these grounds. Accordingly, we find that by failing to squarely raise any question regarding the new manager position before the district court, Tanca has waived the opportunity for argument on that point here. See Timberland Design v. First Serv. Bank for Sav., 932 F.2d 46, 51 (1st dr. 1991) ("It is clearly established that arguments not raised at the district court level will not be considered on appeal."); see also Kavanaugh v. Greenlee Tool Co., 944 F.2d 7, 10 (1st Cir. 1991); Nimrod v. Sylvester, 369 F.2d 370, 372 (1st Cir. 1966). Even were we not to find waiver, Tanca's position would fail. Simply put, we cannot see how the trial court could have felt that anything besides the UT position was at issue.[9] The district court, therefore, did not err in its answer to the jury's question, as the pertinent issue was not whether any Hyannis position would have been offered Tanca, but whether the

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9 For example in his pre-Trial Memorandum, Tanca listed only two contested issues of fact:

A. The reasons why Mr. Tanca was not awarded the position of U. I. Manager in Hyannis, Massachusetts.

B. Mr. Tanca's damages.

See Correa v. Hospital San Francisco, 69 F.3d 1184, 1195 (1st Cir. 1995) (noting that failure to raise an issue in the final pretrial order generally constitutes waiver)

UI position would have been offered.

## CONCLUSION

In view of the above the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 95-1628

JAMES TANCA
Plaintiff - Appellant,

v.

NILS NORDBERG, COMMISSIONER,
AND THE MASSACHUSETTS DEPARTMENT
OF EMPLOYMENT AND TRAINING,
Defendants - Appellees.

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ERRATA SHEET

The opinion of this Court issued on October 28, 1996, is amended as follows:

On page 6, line 3 the word 'not" should be deleted.